In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-594

INTERCOUNTY CONSTRUCTION COMPANY, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that under the civil penalty provisions of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*)[1] a "willful" violation is one committed with evil intent to violate the law rather than, as

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[1]29 U.S.C. 654(a)(2) requires that every employer affecting interstate commerce "shall comply with occupational safety and health standards promulgated under this chapter." See also 29 U.S.C. 652(5). 29 C.F.R. 1926.652(c), the pertinent standard, provides:

> Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each ½-foot horizontal.

29 U.S.C. 666(a) provides, in pertinent part:

> Any employer who willfully * * * violates the requirements of section 654 of this title, [or] any standard * * * or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $10,000 for each violation.

the court of appeals held, one reflecting either an intentional disregard of the Act or plain indifference to its requirements.

1. Petitioner is a construction company which specializes in underground construction. In April 1972, it was digging trenches and laying pipe for an interceptor sewer system in Arlington County, Virginia (Pet. App. 3a, 22a) One morning some of its employees were working at the bottom of a trench 10.7 feet deep and 40 feet long, which was not sloped, shored or otherwise protected against collapse (Pet. App. 3a, 10a, 25a; Tr. 108).[2] Pursuant to a telephoned complaint, the Occupational Safety and Health Administration, Department of Labor ("OSHA"), informed petitioner's president that the reported condition appeared to violate pertinent trenching regulations and might constitute danger to exposed employees. The president assured OSHA the condition would immediately be corrected, telephoned his job foreman that the trench did not comply with applicable regulations, and ordered the foreman to place a portable trench shield or "mule" in the trench (Pet. App. 3a, 12a, 28a; Tr. 27-29, 108, 273-274).[3]

The mule was lowered into the trench under the foreman's supervision, at about 11:30 a.m. that day. However, the foreman ordered it removed at 2 p.m. to install another pipe section, and he and two other employees thereafter worked at the trench bottom without protection against cave-ins (Pet. App. 3a, 25a-26a; Tr. 276-282). The next morning employees worked in the trench shovelling out mud which had accumulated during an overnight rainfall.

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[2]"Tr." refers to the transcript of proceedings before the Occupational Safety and Health Review Commission, which forms part of the appendix in the court of appeals.

[3]This particular mule was 20 feet long, 8 feet high and 8 feet wide. Although present at Intercounty's job site from the excavation's start, it was not used until OSHA responded to the employee complaint (Pet. App. 3a, 25a; Tr. 110-112, 124-127, 133, 273-274).

They also performed other operations at the trench bottom without being protected against collapse (Pet. App. 3a, 26a, 29a; Tr. 124, 282, 288-289).[4] The mule was replaced about two hours after work began, but employees continued intermittently to work outside its protection under the foreman's supervision (Pet. App. 12a, 30a; Tr. 283, 290-291).

It was undisputed that petitioner's safety director was familiar with OSHA trenching regulations and had instructed his foreman regarding their contents, that the job foreman also knew the regulations required the trench walls to be protected against collapse and knew the trench could have been stabilized by other means if use of the mule was infeasible (Pet. App. 4a-5a, 12a, 31a; Tr. 241, 245, 248-250, 297-298). Petitioner's defense to the willful violation charge was that the company thought it was in substantial compliance with the applicable regulations and that its foreman believed the trench safe despite those regulations (Pet. App. 4a-5a, 12a).

After a penalty citation by the Secretary of Labor imposing a $10,000 fine for the violation, and administrative review which upheld the citation but reduced the fine to $5,000,[5] the court of appeals affirmed (Pet. App. 1a-8a). It held that petitioner willfully violated the Act when its foreman with full knowledge of pertinent safety requirements removed the mule from the trench

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[4]In addition to normal shoring requirements, 29 C.F.R. 1926.651(d) provides that "after every rainstorm * * * the protection against slides * * * shall be increased if necessary."

[5]See Pet. App. 18a-35a, Decision and Order of Administrative Judge; Pet. App. 9a-17a, Decision of the Occupational Safety and Health Review Commission.

and permitted unprotected work to continue. The court rejected petitioner's contention that the penalty provisions cover only violations done with a deliberate intent to defy the Act, stating that "to require the Commission to find such a bad purpose * * * would place a severe restriction on the statutory authority of OSHA to apply the stronger sanctions in enforcing the law, a result * * * not * * * intended by Congress" (Pet. App. 6a). Instead it concluded "that willfulness is used in the mere cognitive sense [common] in civil statutes" (*ibid.*), and therefore willful action (Pet. App. 5a)—

> means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, "regardless of venial motive." * * * The facts here indicate such a conscious, deliberate decision. After the company was advised by OSHA that protective measures were necessary and had placed the "mule" in the trench to achieve compliance it intentionally removed the "mule" from the trench. Regardless of any good-faith belief that the work area remained safe the fact is that the company knowingly chose not to comply with the OSHA regulations and requirements. That decision was a willful action in violation of the law.

The court stated that the meaning of "willful" in a civil statute "would seem to have been answered" by *United States* v. *Illinois Central Railroad Co.*, 303 U.S. 239, 243, which held action willful when done by a person "who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements" (Pet. App. 7a).

2. The court of appeals correctly held that under the penalty provisons of the Act a violation is willful if committed

"knowledgeably by one subject to the statutory provisions in disregard of the action's legality," and that a deliberate intent to defy the Act is not required. That is the normal meaning of the term in regulatory statutes, which ordinarily do not even require "consciousness of wrongdoing" as an element of the offense (*United States* v. *Park*, 421 U.S. 658, 670-671; cf. *United States* v. *Illinois Central Railroad Co., supra; United States* v. *Bishop*, 412 U.S. 346, 361). There is no indication that Congress intended the concept to be more stringent in this Act.[6] To the contrary, as the court of appeals pointed out (Pet. App. 6a), "to require the Commission to find such a bad purpose * * * * would place a severe restriction on the statutory authority of OSHA to apply the stronger sanctions in enforcing the law."

The Fourth Circuit's decision accords with those of two other circuits that have recently considered the question. *F.X. Messina Construction Corp.* v. *Occupational Safety and Health Review Commission*, 505 F.2d 701 (C.A. 1); *United States* v. *Dye Construction Co.*, 510 F.2d 78 (C.A. 10). Petitioner argues (Pet. 9-10) that the decision conflicts with the Third Circuit's ruling in *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1207, affirmed *en banc*, 519 F.2d 1215, petition for a writ of certiorari pending, No. 75-748, that

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[6]Petitioner's argument (Pet. 7-9) that "willful" must be defined restrictively lest it overlap with the definition of a "serious violation" (see 29 U.S.C. 666(a), (b), (j)) is not well taken. "Serious" violations are defined in terms of risk of serious injury, 29 U.S.C. 666(j). See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 518 F.2d 990, 1013 (C.A. 5). But cf. *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1207, affirmed *en banc*, 519 F.2d 1215 (C.A. 3), petition for a writ of certiorari pending, No. 75-548. Willfulness, to the contrary, focuses on actual knowledge of a regulation — knowledge which must be proved as part of the Secretary's *prima facie* case.

The *en banc* proceedings and affirmance did not address the willfulness issue.

"[w]illfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting [flouting] of the Act." As applied to the facts of this case, however, there is no conflict. *Irey* involved a foreman's good-faith mistake of fact regarding the soil composition of a particular trench. If the foreman's mistaken assumption was correct the trench was not dangerous and no protection against collapse was necessary. 519 F.2d at 1206-1207. Even in that situation the Third Circuit did not hold that the conduct was not willful, but remanded the case to the agency. 519 F.2d at 1207, 1219.

In the present case, in contrast, there was no mistaken assumption of fact. The agency and the court of appeals both found that petitioner knew it was violating applicable regulations (Pet. App. 4a-8a). The conduct in the present case is thus significantly different from that in *Irey*, and there is no reason to think that the Third Circuit would disagree with the Fourth Circuit that petitioner's conduct here was willful.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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